B. Responses to a Petition of Suit

1. Response Concerning the Substance of the Suit

A respondent has the right to make a written response to a claim filed against it, although is not required by law to do so. A written response must be signed by the respondent or respondent's representative, and must state:

- ❑ the name of the arbitrazh court to which the response is sent;
- ❑ the name of the plaintiff and the number of the case;
- ❑ reasons for the rejection of the demands and arguments of the plaintiff, containing reference to the laws or regulatory acts and the evidence supporting the response; and
- ❑ a list of the documents appended to the response, which should include those giving evidence of the circumstances relied on in the response, evidence that the response was sent to the other parties in the case, and a power of attorney for the representative, if a representative has signed the response.

The law does not specify a rigid period of time within which the response must be made, but rather states that it should be sent so as to be received prior to the day of consideration of the case in court, and copies sent to the other parties in the case together with copies of appended documents that they do not already have. An example of a response to a petition of suit appears as Appendix D to the Handbook.

Because the respondent is under no obligation to make a response, it is quite possible that the plaintiff will not learn of the arguments that the respondent wants to make until they are presented at the hearing of the case in court. The plaintiff may also make

additional arguments and present additional evidence during the court hearing that was not mentioned in its original petition. Unlike some other systems with which readers may be familiar, the rules for pre-trial proceedings are not designed to ensure that the parties state all of their claims and provide all of their evidence to one another prior to the hearing of the case, in an attempt to foster settlement. The requirement of a written demand, which was previously a part of the general procedures, was in part designed to serve this purpose, but no longer applies except as discussed above in Section A.1. There are no procedures by which an opposing party may be forced to reveal evidence or theories prior to their presentation in court. The absence of extensive pretrial procedures of this type may be of great value in limiting the amount of procedural delay prior to the first hearing of the case by the court. Such absence, however, may also have the effect of reducing incentives and capacity for settlement at the earliest stages of a dispute and increasing later delays as parties request time to respond to unexpected arguments and evidence.

2. Counter-Claims

A respondent may also respond to the filing by making a counter-claim against the plaintiff. The counter-claim may be filed immediately, in response to the initial filing, or at any time prior to the court's decision in the case. Procedure for filing a counter-claim is the same as that for filing any petition of suit. The counter-claim is to be accepted as such if it is: (1) of a type that is to be credited against the original claim, (2) if the satisfaction of the counter-claim will preclude the satisfaction of the original claim in whole or in part, or (3) if there is sufficient connection between them that joint consideration will lead to a swifter or more correct resolution of the matter. If not sufficiently connected to the original petition, the counter-claim may be heard separately by the arbitrazh court.

3. Challenges to the Jurisdiction of the Court

a) Existence of an Arbitration Agreement

According to Article 23 of the APC, a dispute that is subject to arbitrazh court jurisdiction under general principles may be transferred for the consideration of an arbitration tribunal if there is an agreement of the parties. The agreement may concern the specific dispute that has arisen, or may be a general agreement to transfer future disputes that arise between the parties (often an arbitration clause in a contract). Article 23 states that a case may be transferred pursuant to such an agreement at any time prior to the adoption of decisions by an arbitrazh court concerning the case. This does not, however, indicate that one party wishing to challenge jurisdiction on the grounds that an arbitration agreement exists may do so at any time prior to the issuance of a decision in the case.

If one of the parties has filed a case in the arbitrazh courts, and that case is otherwise subject to the court's jurisdiction, the court may leave the case without consideration and transfer it to an arbitration tribunal only under certain conditions.[12] The conditions required are:

1. the existence of a valid arbitration agreement (clause);

2. confirmation that the ability to make recourse to the arbitration tribunal has not been lost; and

3. the respondent objecting on this ground to the court's jurisdiction makes this objection ***no later*** than the first response concerning the substance of the case.

Thus, although Article 23 permits a transfer of a case to an arbitration tribunal by ***mutual agreement*** of the parties at any time prior to the first decision in the case, the much more common situation of objection by one party (the respondent) to a court process on the grounds of an existing arbitration agreement requires ***immediate objection***. If the objection is not made prior to or concurrent with the respondent's first substantive response to the suit, the right is lost. This rule is consistent with the rules applicable to cases concerning international arbitration under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[13] If a respondent makes the objection in a timely manner, but the court rejects the respondent's arguments concerning the arbitration tribunal and proceeds to hear the case, the court's decision on this issue may be appealed in the usual manner.

b) Outside Arbitrazh Court Jurisdiction

A challenge may also be made to the jurisdiction of the arbitrazh court on the grounds that the case is not within arbitrazh court jurisdiction. In theory, a determination will have been made by an arbitrazh court judge that the case does fall within the court's jurisdiction at the time that petition of suit was reviewed and accepted by the court. This initial determination, however, is by definition made on the basis of the information contained in the initial petition of the plaintiff, and the respondent may object to arbitrazh court jurisdiction in its response, providing new information, evidence and arguments on the issue. Should the court determine, contrary to the respondent's arguments, that it does have jurisdiction, this determination may be appealed in the general fashion (see below). Unlike the issue of an arbitration agreement, however, an objection to the fundamental jurisdiction of the arbitrazh court is not lost if not made immediately at the opening of the case, and can be raised on appeal even if not raised at earlier stages of the proceedings.

[12] See generally Article 87 of the APC.

[13] Russia is a party to the New York Convention, as the successor-state to the Soviet Union. The Convention and the rules concerning the enforcement of the awards of arbitration tribunals are discussed in Chapter 5